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Civil Procedure And Evidence—Appeal

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Appeal

The New York State Constitution limits the jurisdiction of the Court of Appeals and authorizes appeal by permission.[1] New York Civil Practice Act §589 supplements this by providing:

> "Appeal to the court of appeals lies only
> (1) by permission of the appellate division, and not otherwise,
> (a) from a judgment or order of the appellate division which does not finally determine the action or special proceeding in which it is entered . . ."

An Appellate Division order which reverses an order vacating a final judgment and denies the motion is not a final order. An appeal therefrom does not lie as of right, but only by permission of the Appellate Division.[2] But where the motion to vacate is made by a person not previously a party, this is a separate proceeding which results in a final order, and appeal is a matter of right.[3]

These rules were reiterated in *Arbitration Between Republique F., Etc.*[4] The case involved proceedings in the matter of arbitration of questions arising out of contracts between the French government and an Illinois corporation. From an order of the Appellate Division[5] which unanimously reversed on the law an order of the Special Term,[6] the moving parties appealed. The latter court had granted a motion by the corporation and its sole stockholder, appearing specially, to vacate an order confirming an arbitrator's award and the judgment thereon. The Appellate Division, denying the motion, directed reinstatement of the judgment. The Court of Appeals after a discussion of questions involving constitutional due process, corporations and corporate survival statutes reinstated the order of the Special Term. It was decided that the arbitration procedure was a nullity because France did not give the corporation "a reasonable opportunity to be heard" in accordance with their agreement and constitutional due process.[7] In the instant case, defendant mailed notice of demand for arbitration to the corporation. This was returned by the post office with the notation "out of business." At the close of arbitration proceedings attended only by the defendant, notice of motion to confirm the award was sent to the same address as the previous notice. This did not give the Supreme Court in personam jurisdiction over the corporation. The court therefore *held* the corporation was a third party for the purpose of

1. N. Y. CONST. art. VI §7 (4, 5, 6).
2. See COHEN AND KARGER, POWERS OF THE N. Y. COURT OF APPEALS, (2nd ed. 1952), p. 143 and cases there cited.
3. *U. S. Trust Co. of N. Y. v. Bingham,* 301 N. Y. 1, 92 N. E. 2d 39 (1950); *Matter of Burdak,* 288 N. Y. 606, 42 N. E. 2d 608 (1942).
4. 309 N. Y. 269, 128 N. E. 2d 750 (1955).
5. 284 App. Div. 699, 134 N. Y. S. 2d 470 (1st Dep't, 1954).
6. 124 N. Y. S. 2d 93 (1953).
7. *DeDood v. Pullman Co.,* 57 F. 2d 171 (1932); *Grover & Baker Sewing Mach. Co. v. Radcliffe,* 137 U. S. 287 (1890).

the finality rule and appeal was of right. This decision extends the third party finality rule to one named as a party to an action or proceeding but over whose person no jurisdiction has been obtained even though he was the only party named.

The three dissenters were of the opinion that the notice of the proceedings had been given to the corporation by virtue of a demand for arbitration sent to its sole stockholder and that the notice of motion to confirm the award complied with both their agreement and New York Civil Practice Act §1461. They therefore concluded the corporation was a party and appeal lay only by permission; since this had not been obtained they would have dismissed.

Corporation as a Citizen

The Constitution of New York State declares that timber in the Forest Preserve shall not be "sold, removed or destroyed."[8] In a proceeding under section 4 of that article[9] for permission to institute a suit to restrain the Conservation Commissioner from contracting for cutting blown-down timber in the Preserve, on the ground that the statute[10] authorizing such contracts is unconstitutional, it was *held,* for purposes of bringing suit to enjoin violations of that portion of the Constitution the petitioner membership corporation is a citizen within the meaning of that clause.[11]

This decision was based on the finding by the Court that there is no absolute and inflexible rule that a corporation, especially a membership Corporation, may not be deemed a citizen for various purposes.[12] The Appellant's contention that a corporation has no justiciable interest that makes it an appropriate champion of constitutional principles was shown by the Court to be of no weight, in that the issue is whether or not the plaintiff has a justiciable interest in the controversy rather than whether or not it is a corporation. This is apparent from the cases which have upheld the right of a membership corporation to sue for the

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8. N. Y. CONST. art. XIV, §1.

9. *Violations of Article—How Restrained:* ". . . or with the consent of the Supreme Court Appellate Division, on notice to the attorney general at the suit of any *citizen.*" (emphasis supplied).

10. N. Y. Conservation Law §250 (36).

11. *Oneida County Forest Preserve Council v. Wehle,* 309 N. Y. 152, 128 N. E. 2d 282 (1955).

12. *Anglo-American Provision Co. v. Davis Provision Co.,* 169 N. Y. 506, 62 N. E. 587 (1902); *Fire Department v. Stanton,* 28 App. Div. 334 51 N. Y. Supp. 242 (1st Dept. 1898); *Salem Trust Co. v. Manufacturer's Finance Co.,* 264 U. S. 182 (1924).